IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 9209 of 2002

with

CRIMINAL MISC.APPLICATION No 9221 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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PARLE BISLERI PRIVATE LIMITED

Versus

STATE OF GUJARAT

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Appearance:

1. Criminal Misc.Application No. 9209 of 2002
   MR HRIDAY BUCH for Petitioner No. 1-2
   MR VM PANCHOLI, APP for Respondent No. 1
   MR HN BRAHMBHATT for Respondent No. 2
2. Criminal Misc.Application No. 9221 of 2002
   MR HRIDAY BUCH for Petitioner No. 1
   MR VM PANCHOLI, APP for Respondent No. 1

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CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 04/08/2003

ORAL JUDGEMENT

These two petitions by one and the same petitioner have been filed under Section 482 of the Code of Criminal Procedure, 1973 (for short, "the Code") in order to pray to quash Criminal Cases No.2180/2002 and 2181/2002 pending before the learned Metropolitan Magistrate, Ahmedabad for an offence punishable under Section 138 of the Negotiable Instruments Act, 1881 against the petitioner.

2. The second respondent in both the matters has instituted the aforesaid criminal cases against the petitioner for an offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (for short, "the Act") stating that the petitioner had issued cheques to the second respondent and when the cheques were presented to the bank for encashment purpose, they were dishonored by the concerned bank, with an endorsement that the drawer of the cheques had stopped payment of these cheques. Notices were issued by the concerned respondent to the petitioner and since the Notices were not complied with, the above complaints were filed by the second respondent against the petitioner.

3. Feeling aggrieved by the said complaint and order passed by the trial court, taking congnizance of the offence in question and directing the issuance of summons to the petitioner, the petitioner has filed the present two petitions under Section 482 of the said Code, for quashing and setting aside those two criminal cases. The petitioner has contended before this Court, in these two petitions that there was a civil dispute between the parties regarding the dues and therefore, the petitioner had directed that the payment be stopped. So, the payment was stopped in each case, on his instruction. That, therefore, it does not amount to an offence punishable under Section 138 of the said Act. That, in view of the above position, the second respondent should not have placed the cheques for payment and the petitioner was obliged to direct stop payment and therefore, it amounts to no offence under Section 138 of the said Act. That the second respondent is required to establish his legitimate dues and has also to establish a prima facie case that in discharge of their legal liability, the cheques were issued. That there was no

legal due in favor of the second respondent and therefore, the trial court ought not to have issued process, after registering the complaint; that the complaint has been filed with a view to abuse the process of law and court; that therefore, when no offence is made out, the complaints are required to be quashed. The petitioner has, therefore, applied to quash the said two complaints filed by the second respondent against the petitioner.

4. Notice was issued and in response to the service of notice, Mr.H N Brahmbhat has appeared on behalf of respondent no.2, original complainant, whereas Mr.V M Pancholi learned APP has appeared on behalf of the State. I have heard the learned advocates for the parties and have perused the papers.

5. Indisputably, the parties were at commercial contract with respect to distribution of the goods of the petitioner. Cheques were admittedly issued by the petitioner and they were admittedly returned by the concerned bank, with an endorsement that the payment was stopped in each of the two matters. These facts have not been disputed before this Court.

6. Mr.H C Buch learned advocate for the petitioner, original accused, has taken me through certain documents which are placed at page 24, 26, 28, 29 etc.. By referring to pages 30 and 31, an attempt has been made by the learned advocate for the petitioner that these documents clearly show that the petitioner had sufficient amount in the bank account and therefore, the cheques in each of the two matters, could be easily encashed. In order to argue the same, he has referred and relied upon the two Balance Sheets, at pages 30 and 31, to show that there was sufficient balance in the bank account of the petitioner, at the relevant point of time. Now, this is a copy of the account book of the petitioner, which can be produced and proved before the trial court at the relevant point of time. Even the account from the bank itself can be taken help of and the said account can also be produced by the petitioner before the trial court, in order to show that there was sufficient balance in the bank account, which could honor the cheques. This being a question of fact, it cannot be entertained at this stage, for the purpose of invoking inherent jurisdiction of this Court under Section 482 of the said Code. It is open to the petitioner to produce the same before the trial court and to prove it in accordance with law. This Court cannot look into the said account at present for the purpose of this petition. It is more so when, even

the entries posted in these accounts, at pages 30 and 31, are required to be proved by bringing appropriate evidence. This can be done only before the trial court at the stage of trial. Therefore also, it is not open to this Court to look into these documents, which are not admitted documents. Moreover, they are not public documents also. It, therefore, cannot be said that the payments were stopped by the petitioners, on account of the civil dispute between the parties despite sufficient bank balance and therefore, no offence can be said to have been committed by the petitioner, by directing stop payment of those two cheques.

8. It has also been argued by the learned advocate for the petitioners that the second petitioner has come out with two different names, Moon Star Sales and Moon Star Company. It seems that both are Proprietary concern and their Proprietors are different. In the present case, Moon Star Sales are the complainants and respondents in both the matters. Moon Star Company, through its Proprietor, is not a complainant before the trial court and therefore, he is not respondent no.2 in these petitions.

9. At one stage, the learned advocate for Moon Star Sales i.e. respondent herein made a statement that his client has filed summary civil suit before the Court of Small Causes at Ahmedabad. However, he immediately corrected his statement and made a statement that the suit was filed not by Moon Star Sales, but, it was filed by Moon Star Company, through its Proprietor Ketan Arvindbhai Patel. The copy of the plaint at page 83, discloses that the suit was filed by Moon Star Company, through its Proprietor Ketan Arvindbhai Patel. At this stage, learned advocate for the petitioner has argued that Moon Star Company and Moon Star Sales are one and the same institutions and they have also been referred in the correspondence between the parties. It is also noticed that on certain documents, we find the rubber stamp of Moon Star Company, though the vouchers are of Moon Star Sales. This can be gathered from a document placed at page 69.

10. Now, it is a matter on record that the copy of the complaint which is placed at page 83, reveals Ketan Arvindbhai Patel is the Proprietor of Moon Star Company, whereas, the complaint has been filed by Ashwin Purshottambhai Patel, being the holder of general power of attorney of Himanshu Ghanshyambhai Patel, being the Proprietor of Moon Star Sales. This can be gathered from the copy of the complaint at page 17.

11. This shows that the Proprietors of Moon Star Sales and Moon Star Company are different. An attempt was made to show that different addresses have been shown in respect of the complainant, in the criminal cases in question, at page 17 and the address of the plaintiff in the copy of the plaint, at page 83. This Court cannot enter into a question of fact, as to whether Moon Star Company and Moon Star Sales are one and the same. Even if it has been referred in the correspondence between the parties, it remains a question of fact and therefore, it would not be advisable for this Court, to decide the question of fact in a petition under Section 482 of the said Code.

12. It has also been argued on behalf of the petitioner that there was some civil dispute between the parties, as borne out from the correspondence and from the contentions raised in the petition. Now, when there is a civil dispute between the parties, with respect to the dues, it would not be open to this Court, to enter into that area of disputed question of fact. It would be open to the petitioner, to lay appropriate evidence before the trial court, in order to prove his case and in order to disprove the case of the respondents. Even for the purpose of deciding this factual issue, one has to go behind the cheques which exercise is not permissible in a proceeding like the present one.

13. The learned advocate for the petitioner has also argued that the parties were at business and the business was going on smoothly. That respondent no.2 had voluntarily resigned from the contract and the business was closed down; that some amount was deposited with the petitioner and the second respondent demanded the same from the petitioner; that a suit has also been filed by the second respondent against the petitioner for the recovery of the said amount; that when the suit has been filed for the recovery of the said amount, it is clear that there is a prima facie case of civil dispute between the parties and the second respondent will be required to prove his dues from the petitioner before the civil court. Now, simply because a civil suit has been filed, it does not mean that criminal case cannot proceed ahead. After all, the civil suit will decide the civil liability of the defendant in the civil suit, whereas criminal liability can be decided in a criminal case against the petitioner before a criminal court. Therefore, simply because a civil suit is pending and civil dispute is also pending between the parties, the criminal complaint cannot be quashed.

14. It has also been argued that the amount recovered by the second respondent was required to be adjusted against the two cheques, which are the subject matter in dispute, in these two criminal cases. This would again be a question of fact of civil dispute between the parties, which can be dealt with and decided at the stage of trial. This court will not enter into that area of civil dispute between the parties.

15. At attempt was made to argue on behalf of the petitioner that the petitioner had sent some goods to the second respondent vide Bills No.857, 859 and 869 on 24/07/02 and the total value thereof would go to Rs.60,000/-. It has also been argued that the said amount has not been paid by the second respondent to the petitioner and therefore, vide letter dated 17/09/02, the petitioners had informed the second respondent, either to make payment of the said goods referred to hereinabove or to return the said goods; that the petitioner did not receive the said goods back from the second respondent and therefore, the said amount of Rs.60,000/- is required to be adjusted against the two cheques, which are the subject matter in dispute in these two matters. This would again be a disputed question of fact which cannot be entertained, dealt with a decided by this Court in this petition.

16. It is well settled that when a petition under Section 482 of the Code has been filed or when a petition under Article 226 or 227 of the Constitution of India has been filed, then in that event, the matters are required to be decided on appreciation of material placed before this Court. However, the Court while deciding such matters will not enter into disputed questions of fact. It is well settled that the disputed questions of fact will require oral and documentary evidence. Such an evidence is required to be produced and then it is required to be appreciated by the Court. This Court would not undertake a process of appreciating the evidence on record on facts. In other words, the factual dispute cannot be entertained in this petition by this Court and once it is found that this Court cannot enter into appreciation of fact situation, then the above issues raised by the petitioner in these two petitions cannot be entertained, dealt with and decided by this court. In other words, the two petitions involve substantial questions of fact, which require appreciation of evidence on fact situation, which would further require recording and then appreciation of oral evidence and production, proof and appreciation of documentary

evidence. I am afraid, this Court cannot enter into this area of appreciation of evidence on fact and once it is found that this Court cannot enter into that area, then in that event, there is no other material which is required to be dealt with and decided by this Court at this stage in these petitions.

17. In other words, I am of the view that the present two petitions substantially involve questions of facts, which can be dealt with and decided by appreciation of evidence on fact. Since this cannot be done in this petition, the petition has to fail on this ground alone.

18. The learned advocate for the petitioner has also argued that the matter can be disposed of, even on appreciation of documents. However, the documents are also disputed and the contesting respondent has come out with a case that Moon Star Sales and Moon Star Company are two different proprietary concerns and their proprietors are different persons. It has also been contended on behalf of the contesting respondent that the contesting respondent in each matter is not required to pay Rs.60,000/- to the present petitioner and is also not required to send back the goods to the petitioner. This would again be a matter of disputed question of fact and therefore, it cannot be entertained, dealt with and decided by this Court at this stage in these petitions. In that view of the matter, I am of the view that disputed questions of fact are pleaded and argued in the present two matters and therefore, these are not the matters which can be dealt with and decided by this Court. It would be open to the parties to deal with these disputed questions of fact at the trial before the trial court appropriately.

19. During the course of the submission, a decision in Goaplast Pvt. Ltd. V/s. Shri Chico Ursula D'souza reported in 2003(2) GLH 75 was relied upon. There it has been observed that once a cheque is issued by the drawer, a presumption must follow that the holder of cheque receives it in discharge of whole or part liability or debt. It has also been observed that issuance of notice by a drawer to the drawee or to the bank for stoppage of payment, will not preclude an action under Section 138 of the said Act by the drawee.

20. Again an attempt was made by the learned advocate for the petitioner to argue that here it is a matter on record that the cash balance was more than the amount of cheque. For this purpose, the petitioner has produced his account to show his bank balance. This is not an admitted document and therefore, it cannot be appreciated

by this Court at this stage for the purpose of deciding the present petition. Moreover, we may look into the contents, allegations and averments of the complainant but not the defence of the accused.

21. On the other hand, in M.M.T.C. Ltd V/s. Medchl Chemical and Pharma (P) Ltd. reported in 2002(1) SCC 234, it has been laid down that the High Court could not examine the merits of the complaint and could not, merely because the application did not contain a specific allegation to the contrary, hold that the cheques were not issued for any debt or existing liability. It is, further observed that the onus to prove the non-existence of a debt or liability lay on the drawer and it has to be discharged at the trial. It is, further observed in it that complaint need not allege existence of a subsisting debt or liability against which cheque was issued and that the burden of proving non-existence of any debt or liability is on the accused which has to be discharged at the trial. Prior to that, complaint cannot be quashed by High Court by invoking inherent jurisdiction under Section 482 of the Code. It has also been observed that when a cheque has been dishonored on account of drawer's stop payment, it does draw a presumption under Section 139 of the said Code which is rebuttable by drawer at the trial. In the present case also, it would be open to the petitioner to rebut the said presumption, at the trial, by leading evidence at appropriate stage.

22. The decision in A.V.Murthy V/s. B.S.Nagabasavanna reported in 2002(2) SCC 642 was also relied upon. Here, the appellant before the Hon'ble the Supreme Court had filed the complaint under Section 138 of the said Act against the respondent - accused alleging that the cheque issued by the accused in favor of the complainant in respect of a sum advanced to the accused by the complainant four years ago was dishonored by the bank for the reason "account closed". There the Magistrate had issued summons to the accused. Criminal Revision Application was filed by the accused and the Sessions Court quashed the entire proceedings, on the ground that since the alleged borrowing was barred by limitation at the time of issuance of the cheques, there was no legally enforceable debt or liability against the respondent under the explanation to Section 138 of the said Act and therefore the complaint was not maintainable. The High Court upheld the said decision. Taking a view different from the two views recorded by the two courts as aforesaid, the Hon'ble the Supreme Court observed, that in view of Sections 118 and 139 of the Negotiable Instruments Act, 1881 and Section 25(3) of

the Contract Act, 1872 and in the presence of documentary evidence which might amount to acknowledgment reviving the period of limitation, the case was not one where the cheque was drawn in respect of a debt or a liability, which was completely barred from being enforced under the law. The Hon'ble the Supreme Court also observed that these are the matters which were required to be agitated before the Magistrate by way of defence of the respondent; that at the stage of the proceedings before the Sessions Court or before the High Court to say that the cheque was drawn by the accused was in respect of a debt or liability which was not legally enforceable was clearly illegal and erroneous. The Hon'ble the Supreme Court observed that the Sessions Court and the High Court erred in quashing the complaint proceedings.

23. In Modi Cements Ltd. V/s. Kuchil Kumar Nandi reported in (1998) 3 SCC 249, it has been laid down that stop payment instructions cannot obviate the offence under Section 138, if otherwise made out. Again, it has been observed that presumption under Section 139 is attracted to such a situation which was wrongly ignored by the Court in the said matter. It is, further observed that drawer of the cheque will have opportunity to rebut the presumption at the trial. Now, here we find that the petitioner has sought to rebut the said presumption by producing his books of accounts, showing the credit entries in his books of accounts. Now, these entries are required to be proved and the proof will require evidence and appreciation of evidence, which cannot be undertaken by this Court in this proceeding.

24. In that view of the matter, these being questions of fact, the parties have to go to the trial court and at the trial, the disputed questions of fact can be decided by the trial court, on appropriate evidence which may be produced before it. In the facts and circumstances of the case, I am of the opinion that this matter involves so may disputed questions of fact, which cannot be entertained, dealt with and decided by this Court in this petition under Section 482 of the said Code. It would be open to the parties to produce appropriate materials before the trial court for being appreciated by the Court concerned and it would then be appropriate for the trial court to appreciate the materials before it and decide the questions of fact. In that view of the matter, when the questions of facts have arisen in the matter and when it is found that they cannot be entertained in this matter, it is not possible to agree with the arguments of the learned advocate for the petitioner that atleast the petitions may be admitted and Rule be issued and they may

be dealt with and decided thereafter. The position will not be changed, even if the petitions are admitted. Even after the admission of petitions and after the issuance of Rule in each matter, again there will be disputed questions of fact, which are required to be dealt with and decided, which again cannot be done in these petitions under Section 482 of the said Code.

24. For the foregoing reasons, when there is no merit in these petitions, they are required to be dismissed at admission stage. Therefore, these two petitions are dismissed at admission stage. Notice discharged.

(D. P. Buch, J.)

pravin/

FURTHER ORDER

The learned advocate for the petitioner at this stage states that the petitioner would like to prefer appropriate proceeding before appropriate Court for challenging the aforesaid judgment and therefore, he requests that the stay order granted earlier may be continued for a further period of six weeks. After hearing, it is directed that the interim relief granted earlier will continue for a further period of FOUR WEEKS from today. The amount deposited by the petitioner may naturally be paid back to the petitioner.

(D. P. Buch, J.)

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